

Department of Defense

225.7303-2

country value added taxes or customs duties.

[56 FR 36367, July 31, 1991, as amended at 63 FR 43889, Aug. 17, 1998; 68 FR 15632, Mar. 31, 2003; 70 FR 57192, Sept. 30, 2005]

225.7302 Procedures.

For FMS programs that will require an acquisition, the contracting officer will assist the departmental/agency activity responsible for preparing the LOA by—

(a) Working with prospective contractors to—

(1) Identify, in advance of the LOA, any unusual provisions or deviations;

(2) Advise the contractor if the departmental/agency activity expands, modifies, or does not accept any requirements proposed by the contractor;

(3) Identify any logistics support necessary to perform the contract; and

(4) For noncompetitive acquisitions over \$10,000, ask the prospective contractor for information on price, delivery, and other relevant factors. The request for information shall identify the fact that the information is for a potential foreign military sale and shall identify the foreign customer; and

(b) Working with the departmental/agency activity responsible for preparing the LOA to—

(1) Assist, as necessary, in preparation of the LOA;

(2) Identify and explain all unusual contractual requirements or requests for deviations; and

(3) Assist in preparing the price and availability data.

[56 FR 36367, July 31, 1991, as amended at 62 FR 2617, Jan. 17, 1997; 63 FR 43889, Aug. 17, 1998; 68 FR 15632, Mar. 31, 2003]

225.7303 Pricing acquisitions for FMS.

(a) Price FMS contracts using the same principles used in pricing other defense contracts. However, application of the pricing principles in FAR parts 15 and 31 to an FMS contract may result in prices that differ from other defense contract prices for the same item due to the considerations in this section.

(b) If the foreign government has conducted a competition resulting in adequate price competition (see FAR 15.403-1(b)(1)), the contracting officer shall not require the submission of cost

or pricing data. The contracting officer should consult with the foreign government through security assistance personnel to determine if adequate price competition has occurred.

[64 FR 49683, Sept. 14, 1999, as amended at 68 FR 15632, Mar. 31, 2003]

225.7303-1 Contractor sales to other foreign customers.

If the contractor has made sales of the item required for the foreign military sale to foreign customers under comparable conditions, including quantity and delivery, price the FMS contract in accordance with FAR part 15.

225.7303-2 Cost of doing business with a foreign government or an international organization.

(a) In pricing FMS contracts where non-U.S. Government prices as described in 225.7303-1 do not exist, except as provided in 225.7303-5, recognize the reasonable and allocable costs of doing business with a foreign government or international organization, even though such costs might not be recognized in the same amounts in pricing other defense contracts. Examples of such costs include, but are not limited to, the following:

(1) Selling expenses (not otherwise limited by FAR Part 31), such as—

(i) Maintaining international sales and service organizations;

(ii) Sales commissions and fees in accordance with FAR Subpart 3.4;

(iii) Sales promotions, demonstrations, and related travel for sales to foreign governments. Section 126.8 of the International Traffic in Arms Regulations (22 CFR 126.8) may require Government approval for these costs to be allowable, in which case the appropriate Government approval shall be obtained; and

(iv) Configuration studies and related technical services undertaken as a direct selling effort to a foreign country.

(2) Product support and post-delivery service expenses, such as—

(i) Operations or maintenance training, training or tactics films, manuals, or other related data; and

(ii) Technical field services provided in a foreign country related to accident

225.7303-3

investigations, weapon system problems, or operations/tactics enhancement, and related travel to foreign countries.

(3) Offset costs.

(i) A U.S. defense contractor may recover all costs incurred for offset agreements with a foreign government or international organization if the LOA is financed wholly with customer cash or repayable foreign military finance credits.

(ii) The U.S. Government assumes no obligation to satisfy or administer the offset requirement or to bear any of the associated costs.

(4) Costs that are the subject of advance agreement under the appropriate provisions of FAR part 31; or where the advance understanding places a limit on the amounts of cost that will be recognized as allowable in defense contract pricing, and the agreement contemplated that it will apply only to DoD contracts for the U.S. Government's own requirement (as distinguished from contracts for FMS).

(b) Costs not allowable under FAR part 31 are not allowable in pricing FMS contracts, except as noted in paragraph (c) of this subsection.

(c) The limitations for major contractors on independent research and development and bid and proposal (IR&D/B&P) costs for projects that are of potential interest to DoD, in 231.205-18(c)(iii), do not apply to FMS contracts, except as provided in 225.7303-5. The allowability of IR&D/B&P costs on contracts for FMS not wholly paid for from funds made available on a non-repayable basis is limited to the contractor's allocable share of the contractor's total IR&D/B&P expenditures. In pricing contracts for such FMS—

(1) Use the best estimate of reasonable costs in forward pricing; and

(2) Use actual expenditures, to the extent that they are reasonable, in determining final cost.

(d) Under paragraph (e)(1)(A) of Section 21 of the Arms Export Control Act (22 U.S.C. 2761), the United States must charge for administrative services to recover the estimated cost of adminis-

48 CFR Ch. 2 (10-1-05 Edition)

tration of sales made under the Army Export Control Act.

[56 FR 36367, July 31, 1991, as amended at 56 FR 67216, Dec. 30, 1991; 57 FR 42631, Sept. 15, 1992; 57 FR 53600, Nov. 12, 1992; 59 FR 50511, Oct. 4, 1994; 61 FR 7744, Feb. 29, 1996; 61 FR 18987, Apr. 30, 1996; 63 FR 43889, Aug. 17, 1998; 64 FR 8729, Feb. 23, 1999; 64 FR 49684, Sept. 14, 1999; 68 FR 15632, Mar. 31, 2003]

225.7303-3 Government-to-government agreements.

If a government-to-government agreement between the United States and a foreign government for the sale, coproduction, or cooperative logistic support of a specifically defined weapon system, major end item, or support item, contains language in conflict with the provisions of this section, the language of the government-to-government agreement prevails.

225.7303-4 Contingent fees.

(a) Except as provided in paragraph (b) of this subsection, contingent fees are generally allowable under DoD contracts, provided—

(1) The fees are paid to a bona fide employee or a bona fide established commercial or selling agency maintained by the prospective contractor for the purpose of securing business (see FAR Part 31 and FAR Subpart 3.4); and

(2) The contracting officer determines that the fees are fair and reasonable.

(b)(1) Under DoD 5105.38-M, LOAs for requirements for the governments of Australia, Taiwan, Egypt, Greece, Israel, Japan, Jordan, Republic of Korea, Kuwait, Pakistan, Philippines, Saudi Arabia, Turkey, Thailand, or Venezuela (Air Force) shall provide that all U.S. Government contracts resulting from the LOAs prohibit the reimbursement of contingent fees as an allowable cost under the contract, unless the contractor identifies the payments and the foreign customer approves the payments in writing before contract award (see 225.7308(a)).

(2) For FMS to countries not listed in paragraph (b)(1) of this subsection, contingent fees exceeding \$50,000 per FMS case are unallowable under DoD contracts, unless the contractor identifies the payment and the foreign customer